

BRB Nos. 99-0680  
and 99-0992

PATTI FREEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DEPARTMENT OF NAVY/MWR	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Samuel J. Smith, Administrative Law Judge, United States Department of Labor, and the Compensation Order-Award of Attorney Fees of Joyce L. Terry, District Director, United States Department of Labor.

Diane L. Middleton (Law Offices of Diane L. Middleton), San Pedro, California, for claimant.

Christopher M. Galichon (Dupree, Galichon & Associates), San Diego, California, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (97-LHC-2850) of Administrative Law Judge Samuel J. Smith and the Compensation Order-Award of Attorney Fees (Case No. 18-056276) of District Director Joyce L. Terry rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

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<sup>1</sup>Pursuant to employer's request, BRB No. 99-680 and BRB No. 99-992 were consolidated by Order dated July 2, 1999, for purposes of this decision. *See* 20 C.F.R. §802.104

Claimant was injured when she tripped over a cord on the floor and fell into a counter. She immediately sought treatment and was eventually referred to a neurosurgeon, who performed a cervical discectomy, a route decompression, and a fusion of C4-5 and C5-6 on May 9, 1994. Claimant underwent a second operation on July 5, 1995. Claimant, who was still working for employer at the time of the hearing, sought benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant has no current loss in wage-earning capacity, but that there is a significant potential that her injury will cause diminished earning capacity in the future.<sup>2</sup> Thus, the administrative law judge awarded claimant nominal permanent partial disability benefits in the amount of \$2.85 per week. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The administrative law judge also granted employer a credit pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j), in the amount of \$869.04, as a result of its overpayment of temporary total disability benefits.

Subsequently, claimant's attorney filed a petition with the administrative law judge for a fee in the amount of \$15,193.75, representing 10.75 hours at the hourly rate of \$125 and 69.25 hours at the hourly rate of \$200. In addition, counsel requested \$2,364.50 in costs. The administrative law judge considered and rejected employer's objections based on claimant's limited success, and thus awarded the full amount requested, \$17,558.25. In addition, claimant's counsel filed a fee petition for work performed before the district director. The district director rejected employer's objections based on claimant's limited success and awarded a fee in the amount of \$5,393.75.

On appeal, employer contends that the administrative law judge and district director erred in failing to reduce the amount of the attorney's fees based on claimant's limited success. In addition, employer contends that it is not liable for any fee before the administrative law judge after the date it offered to settle the case for an amount greater than that ultimately awarded by the administrative law judge. Claimant responds, urging affirmance of the awards of attorney's fees.

Initially, employer contends that the administrative law judge erred in finding it liable for claimant's attorney's fee after the date of its tender offer, March 30, 1998. In general, an attorney's fee can be assessed against employer pursuant to Section 28 of the Act only when employer has declined to pay some benefits and claimant thereafter successfully pursues a

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<sup>2</sup>During the course of the hearing, employer conceded that claimant would be entitled to nominal benefits equal to one percent of her average weekly wage. Tr. at 110-111.

claim. *See Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986); *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). Section 28(b), 33 U.S.C. §928(b), specifically provides that when employer pays or tenders payment of compensation without an award, and the employee refuses to accept such payment or tender, employer will be liable for an attorney's fee only if the employee successfully obtains greater compensation than that paid or tendered by employer. *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986).

In the present case, the administrative law judge noted that employer offered to settle the claim based upon a ten percent loss in wage-earning capacity, including payment of future medical benefits and a reasonable attorney's fee, in a letter dated March 30, 1998. Supplemental Decision and Order at 2. It is not contested that claimant did not accept this offer, and was ultimately awarded nominal permanent partial disability benefits of \$2.85 per week, which is one percent of claimant's average weekly wage. The administrative law judge found that the March 1998 offer did not specify whether it was for benefits for a ten percent permanent partial disability, or for a ten percent temporary partial disability.<sup>3</sup> Thus, as the administrative law judge found that the offer was deficiently vague, he found that it did not serve to sever employer's liability for claimant's counsel's fee.

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<sup>3</sup>The administrative law judge found that if the offer was for temporary partial disability, claimant was successful in obtaining greater benefits than those offered as she was awarded continuing permanent partial disability benefits, as temporary partial disability benefits terminate after five years. *See* 33 U.S.C. §908(e).

The evidence, however, indicates that claimant was seeking two periods of temporary partial disability benefits, *i.e.*, from July 25, 1994, to July 5, 1995, and from September 11, 1995, to March 28, 1996, and continuing permanent disability benefits thereafter. The parties do not dispute that claimant's condition reached maximum medical improvement on March 29, 1996. Decision and Order at 3. The administrative law judge did not address the timing of employee's offer in finding that the nature of the benefits that were offered by employer in March 1998 was unclear. As the administrative law judge did not consider that claimant's condition had reached permanency prior to the date of the offer in construing it, we vacate the administrative law judge's finding that employer's offer of March 1998 did not serve to sever employer's liability for claimant's counsel's fee thereafter and remand the case to the administrative law judge for further consideration. If the administrative law judge finds that employer's offer was a valid tender, then employer is liable only for a reasonable fee for work performed prior to the offer. The attorney's fee for work performed thereafter may be assessed against claimant as a lien on the compensation award.<sup>4</sup> *See* 33 U.S.C. §928(c); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987). When assessing a fee against claimant, the administrative law judge must consider the financial circumstances of claimant in his award. 20 C.F.R. §702.132(a).

Employer also contends that the administrative law judge and district director erred in rejecting its contentions that the amount of the fee awards should be reduced as claimant achieved only limited success in pursuing her claims. We agree with employer that the amount of the fees awarded by the administrative law judge and the district director to claimant's counsel cannot be affirmed. Specifically, in light of the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), we hold that the fee awards must be vacated, and the case remanded for further consideration on this issue. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

*Hensley*, 461 U.S. 434; *see also* *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73

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<sup>4</sup>However, employer is liable for the payment of any attorney's fee prior to the date of the tender offer as a controversy remained until that time. *See Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995).

(CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained “excellent” results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

In the instant case, the administrative law judge rejected employer’s contentions regarding the limited success of claimant’s counsel, finding that claimant was successful in establishing permanent partial disability benefits and that the significance of an award of continuing permanent disability benefits “cannot be understated.” However, claimant was seeking permanent partial disability benefits based on a loss in wage-earning capacity of 60 percent.<sup>5</sup> Instead, the administrative law judge found that claimant is entitled to a nominal award in the amount of \$2.85, or one percent of her average weekly wage. In addressing the fee, the administrative law judge found that claimant’s success was greater than the present nominal dollar value, as by obtaining continuing permanent partial disability benefits, claimant preserved her claim for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, and the administrative law judge stated that there is clear potential for claimant’s disability to increase as her condition worsens over time. While the administrative law judge could properly rely on these facts to find that a strict dollar comparison does not fully reflect claimant’s success, this determination does not justify his award of the entire fee sought or his failure to analyze the fee request as required by *Hensley*. In particular, the disparity between the extent of disability sought by claimant and the extent of disability found by the administrative law judge must be considered. Therefore, we vacate the administrative law judge’s finding that the fee should not be reduced to reflect claimant’s limited success. On remand, the administrative law judge must reconsider the amount of the fee award pursuant to the holding in *Hensley*.

In addition, the district director concluded that “although the benefits are less than what was initially sought, and the employer has a credit, which will defer beginning payment for some time, the claimant did prevail.” Compensation Order at 2. As the district director did not consider the significance of the overall relief obtained by claimant in her determination of claimant’s success in pursuing the case, the district director’s award of an attorney’s fee similarly is vacated, and the case is remanded for further consideration pursuant to *Hensley*.

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<sup>5</sup>Claimant argued, in the alternative, that she is entitled to permanent total disability benefits.

Accordingly, the attorney's fee awards of the administrative law judge and the district director are vacated, and the case is remanded for further consideration.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge